

# Exhibit 8





March 29, 2010

**VIA ELECTRONIC AND CERTIFIED MAIL,  
RETURN RECEIPT REQUESTED**

Regional Freedom of Information Officer  
U.S. EPA, Region 9  
75 Hawthorne Street (OPPA-2)  
San Francisco, CA 94105  
r9foia@epa.gov

**Re: Freedom of Information Act Request**

Dear Regional Freedom of Information Officer:

The Center for Biological Diversity ("the Center") is a non-profit, public interest, conservation organization whose mission is to conserve imperiled native species and their threatened habitat and to fulfill the continuing educational goals of its membership and the general public in the process. Consistent with this mission, and pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *et. seq.* ("FOIA"), I respectfully request the following categories of information on behalf of the Center:

1. Any and all maps showing the Black Mesa coal mine, Kayenta coal mine, and/or the Black Mesa Complex, and water quality monitoring sites, impoundments, ponds, seeps, and/or points of discharge
2. Any and all other records related to the construction and operation of earthen impoundments at the Black Mesa coal mine, Kayenta coal mine, and/or the Black Mesa Complex
3. Any and all compliance or monitoring records for Clean Water Act permits for the Black Mesa coal mine, Kayenta coal mine, and/or the Black Mesa Complex
4. Any and all records of communications between the Environmental Protection Agency ("EPA") and the Office of Surface Mining Reclamation and Enforcement ("OSM"), Peabody, and/or the U.S. Army Corps of Engineers regarding permits under the Clean Water Act for the Black Mesa coal mine, Kayenta coal mine, and/or the Black Mesa Complex, including but not limited to any compliance or monitoring records
5. Any and all records related to Clean Water Act permitting for the Black Mesa coal mine, Kayenta coal mine, and/or the Black Mesa Complex that purport to comply with the requirements of the National Environmental Policy Act
6. Any and all records related to Clean Water Act permitting for the Black Mesa coal mine, Kayenta coal mine, and/or the Black Mesa Complex that purport to comply with the requirements of the Endangered Species Act

This request is being sent to the Regional Freedom of Information Officer for EPA Region 9 with the understanding that it will be forwarded to any other offices that may contain the requested information. The Center is willing to receive responsive records in phases and electronic format, where possible.

### REQUEST FOR FEE-WAIVER

The Center requests that you waive all fees in connection with this request. As demonstrated below, the Center meets the two-pronged test under FOIA for a fee-waiver, 5 U.S.C. § 552(a)(4)(A)(iii), as implemented by the EPA's fee-waiver regulations at 40 C.F.R. § 2.107, because "disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 40 C.F.R. § 2.107(k)(1).

In considering whether the Center meets the fee-waiver criteria, it is imperative that EPA remember that FOIA carries a presumption of disclosure, and that the FOIA fee-waiver amendments of 1986 were designed specifically to facilitate access to government records for non-profit, public interest groups such as the Center without the payment of fees. As stated by one Senator, "agencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information . . ." 132 Cong. Rec. S. 14298 (statement of Sen. Leahy). In interpreting this amendment, the Ninth Circuit has stated that the amended statute "is to be liberally construed in favor of waivers for noncommercial requesters." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy). The Ninth Circuit has likewise explicitly pointed out that the amendment's main purpose was "to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA." *Id.*

Thus, both Congress and the courts are clear in their interpretation that the main legislative purpose of the amendments is to facilitate access to agency records by "watchdog" organizations, such as environmental groups, which use FOIA to monitor and challenge government activities. As a District of Columbia Circuit Court has stated, this waiver provision was added to FOIA "in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests," in clear reference to requests from journalists, scholars, and, most importantly for our purposes, non-profit public interest groups. *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 93-94 (D.C. Cir. 1986) (quoting *Ettlinger v. FBI*, 596 F. Supp. 867, 876 (D. Mass. 1984) (emphasis added)).

- I. Disclosure of this information is in the public interest because it will significantly contribute to public understanding of the operations or activities of the EPA in connection with its renewal of a Clean Water Act permit for the Black Mesa and Kayenta coal mines.

The requested information will significantly contribute to public understanding of the issues involved, as required by the EPA at 43 C.F.R. § 2.107(k)(1).

A. The subject of the request concerns the operations and activities of the EPA in connection with its renewal of a Clean Water Act permit for the Black Mesa and Kayenta coal mines.

The subject matter of this request relates to the effects to water quality and availability resulting from the Black Mesa and Kayenta coal mines (also known as the Black Mesa Complex), which are located on the Navajo Nation and Hopi Reservation. In particular, the requested records reflect the manner by and extent to which EPA is considering the environmental consequences of renewal of a National Pollutant Discharge Elimination System ("NPDES") permit, pursuant to the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, for the Black Mesa Complex. These records therefore are clear and identifiable activities of the government, *see* 43 C.F.R. § 4130.6-1—in this case, the executive branch agency EPA. *See Judicial Watch*, 326 F.3d at 1313 (“[R]easonable specificity’ is ‘all that FOIA requires’ with regard to this factor.”) (internal quotations omitted).

B. The disclosure is “likely to contribute” to an understanding of EPA operations or activities.

The requested information concerns the environmental impacts of the Black Mesa and Kayenta coal mines, particularly to water. Thus, the requested information will allow the Center to understand such impacts. As such development would result in impacts to surface- and ground-water, the requested records will also allow the Center to better educate the public about the costs and environmental consequences of the mines. The information requested will contribute to an understanding of whether EPA is fulfilling its obligations under existing laws and regulations with respect to its evaluation of the impacts of the mines to water resources. The public is always well served when it knows how government activities have been conducted. *See Judicial Watch*, 326 F.3d at 1314 (“the American people have as much interest in knowing that key [agency] decisions are free from the taint of conflict of interest as they have in discovering that they are not”). These records are not currently in the public domain. Their release is therefore not just “likely,” but is in fact *certain*, to contribute to better public understanding of EPA’s operations and activities.

In *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1286, the Ninth Circuit made clear that “[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations....” In this instance, all the requested documents will provide new information about the impacts of coal mining—in particular, the Black Mesa and Kayenta coal mines—to water resources. *See Western Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1040 (D. Idaho 2004) (“WWP asserted in its initial request that the information requested was either not readily available or never provided to the public, facts never contradicted by the BLM. Therefore, the Court finds that WWP adequately demonstrated that the information would contribute significantly to public understanding.”); *see also Community Legal Services v. HUD*, 405 F.Supp.2d 553 (D. Pa. 2005) (“Thus, as in *Forest Guardians*, the CLS request would likely shed light on information that is new to the interested public.”); *see also Institute for Wildlife Protection v. U.S. Fish and Wildlife Service*, 290 F.Supp.2d 1226, 1230 (D. Or. 2003) (finding

that the FOIA request was informative of government operations because “there is substantial public interest in agency activities relating to endangered species.”).

**C. The disclosure is likely to contribute significantly to public understanding of the EPA's operations or activities.**

The documents will allow the Center to understand the environmental consequences of the Black Mesa and Kayenta coal mines, and therefore allow the Center to better educate the public about the public policies implicated by, and the costs of, such development. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. The Center intends to fulfill its well-established function of public oversight of agency action. The Center is not requesting these documents merely for their intrinsic informational value. It is irrelevant whether any portion of the Center's request may currently be in the public domain, because the Center requests considerably more than any piece of information that may currently be available to other individuals. *Judicial Watch*, 326 F.3d at 1315.

In addition, the Center plans to use the information it learns from the disclosed information to educate the public about the environmental consequences of coal development and whether and how EPA's analysis adequately takes all of the environmental consequences affecting natural resources into account. *See Western Watersheds Project*, 318 F.Supp.2d at 1040 (requester “adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and...how management strategies employed by the BLM may adversely affect the environment.”). The requested information will reveal in greater detail the public policy costs and benefits of coal development. There can be no dispute that disclosure of the requested documents will provide information that will significantly enhance the public's understanding of such development. Even if the documents fail to reveal that certain actions need to be taken, this does not mean the documents do not serve the public interest. *See Judicial Watch*, 326 F.3d at 1314.

**II. Obtaining the information is of no commercial interest to the Center.**

Access to government documents, disclosure forms, and similar materials through FOIA requests is essential to the Center's role of educating the general public. The Center, a non-profit organization, has no commercial interest and will realize no commercial benefit from the release of the requested information.

**III. The Center has a recognized ability to disseminate this information broadly.**

The Center is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Center has been substantially involved in the management activities of numerous government agencies for years, and has consistently displayed its ability to disseminate information granted to it through FOIA.

In consistently granting the Center's fee-waivers, agencies have recognized that (1) the Center's requested information contributes significantly to the public understanding of the operations or activities of the government, (2) the Center's requested information enhances the public's

understanding to a greater degree than currently exists, (3) the Center possesses the expertise to explain the requested information to the public, (4) the Center possesses the ability to disseminate the requested information to the public, and (5) the news media recognizes that the Center is an established expert in the field of imperiled species and biodiversity.

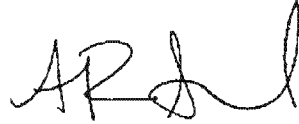
Public oversight and enhanced understanding of the environmental consequences of coal development is absolutely necessary. The Center members' track record of active participation in oversight of governmental agency activities and its consistent contribution to the public's understanding of agency activities as compared to the level of public understanding prior to disclosure are well established. In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a *reasonably broad audience of persons interested in the subject*. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2d Cir. 1994) (emphasis added). The Center need not show how it intends to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient for the Center to show how it distributes information to the public generally. *Id.*

Again, the requested information will be used to inform the Center's and the public's understanding about the environmental consequences of the Black Mesa and Kayenta coal mines to surface- and ground-water. Concurrent with any action which the Center may take after obtaining the requested documents, the Center will publicize these consequences. This is certain to result in a significant increase in public understanding of government agency activity, and in particular of EPA operations and activities. The Center has publicized agency compliance with the provisions of various environmental laws, as well as the policy costs and benefits of pending activities, many times through information gained from FOIA requests like this one. The Center intends to use the documents requested in this request in a similar manner.

Moreover, the Center's informational publications supply information not only to our membership, but also to the memberships of most other conservation organizations, locally as well as nationally and internationally. Our informational publications continue to contribute information to public media outlets, as well. For example, information such as that presently requested is often disseminated through our e-mail Biodiversity alerts, which is sent to nearly 180,000 people approximately once a week, and our web page, which is accessed several hundred-thousand times each month. Information concerning the Black Mesa and Kayenta coal mines will likely be disseminated through all of these means. *See Forest Guardians v. Dep't of Interior*, 416 F.3d 1173, 1180 (10th Cir. 2005) ("Among other things, Forest Guardians publishes an online newsletter, which is e-mailed to more than 2,500 people and stated that it intends to establish an interactive grazing web site with the information obtained from the BLM. By demonstrating that the records are meaningfully informative to the general public and how it will disseminate such information, Forest Guardians has shown that the requested information is likely to contribute to the public's understanding of the BLM's operations and activities.").

I hope that this letter has demonstrated to your satisfaction that the Center qualifies for a full fee waiver. Please send all materials to my attention at the address on the letterhead. Please call me at 503-283-5474 if you have any further questions about this request. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Atwood', with a stylized flourish at the end.

Amy Atwood  
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03/29/2010 01:45 PM

To R9FOIA@EPA

cc 'Amy Atwood' <atwood@biologicaldiversity.org>

bcc

Subject FOIA Request

Please see attached. Please confirm receipt. Contact me with any questions. Thank you.

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FOIA request NPDES maps EPA march 29 2010.pdf

